IN THE

Supreme Court of the United States

October Term, 1975

No. 75-562

ROSEBUD SIOUX TRIBE,
Petitioner,

v.

HONORABLE RICHARD KNEIP, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents adopt, for the purpose of this Brief in Opposition, the material in the Petition under the headings of "OPINIONS BELOW" and "STATUTES INVOLVED."

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition with the exception that the Petition, contrary to Rule 23(1)(a)ii and 23(1)(j), neglects to mention or append the order of the court of appeals respecting a rehearing. A motion for leave to file an enlarged petition for rehearing en banc out of time was considered by the court of appeals and denied on September 16, 1975. The order of the court of appeals appears at Appendix A, *infra*.

QUESTION PRESENTED

Whether three surplus land statutes enacted pursuant to what was in essence Section 5 of the General Allotment Act of 1887 were intended by Congress and understood by the members of the Rosebud Sioux Tribe to disestablish certain portions of the original Rosebud Reservation.

STATEMENT OF THE CASE

On July 30, 1972, the Rosebud Sioux Tribe filed this declaratory judgment action requesting the United States District Court for the District of South Dakota, Western Division, to declare that three surplus land statutes enacted pursuant to the General Allotment Act were not intended by Congress to diminish the territory of the Rosebud Reservation from that originally defined in the Act of March 2, 1889. The issue was extensively and thoroughly researched and briefed by all parties. Approximately 200 pages of briefs and appendices were eventually submitted. Nineteen months later, on February 7, 1974, the district court issued a 53-page carefully considered memorandum opinion.

In the opinion, the court set forth at length the language, legislative history and the surrounding circumstances of the three Acts in support of its decision that the materials all pointed unmistakably to the conclusion that the three Acts were intended by Congress to have an effect on certain portions of the reservation similar to that later found by this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). The reservation nature of the portions of the original reservation affected by the three surplus land statutes, namely, parts of the counties of Gregory and Lyman, South Dakota (1904 Act), the entire county of Tripp, South Dakota (1907 Act), and the county of Mellette, South Dakota (1910 Act), was effectively disestablished. The court further noted that the area unaffected by any of the Acts, a tract known as Todd County, South Dakota, remained intact and the present boundaries of the Rosebud Reservation encompassed the same.

In short, the court found that as an end result of the decade of legislation, the Tribe and the Government spoke clearly. They had agreed to a process that "carved out a diminished reservation" in addition to the retained allotments in the counties in question. *DeCoteau, supra* at 447. This was a fact situation later specifically recognized by this Court in *DeCoteau. DeCoteau, supra* at 447.

The decision of the district court was in conformity with over sixty-five years of state and federal precedent. Thus, as in *DeCoteau,* the decision of the district court did not alter the status quo. *DeCoteau, supra* at 449. The district court concluded:

> certainly this is the treatment that has been accorded those counties from the time of the acts' passage on. There is no dispute but that the State of South Dakota has treated the counties of Mellette, Tripp, Gregory and what was at that time Lyman County, as portions of the state over which the State of South Dakota can exercise jurisdiction since the passage of those acts. Pet. App. B at 109.

On March 13, 1974, the Rosebud Sioux Tribe appealed the decision of the district court to the Eighth Circuit Court of Appeals. A total of approximately 600 pages of briefs and apendices were filed by counsel for Petitioner and by the United States as *Amicus Curiae* in support of the arguments of the Rosebud Sioux Tribe. At oral argument on September 12, 1974, the panel below indicated that it was reluctant to decide the issue until this Court decided the then-pending *DeCoteau* case.

As a result, no further action was taken on the issue until March 12, 1975, when the court of appeals requested a supplementary brief from each of the parties directed to the applicability and effect of the *DeCoteau* decision. An additional 85 pages of supplementary briefs were then presented by counsel for Petitioner, the Government and counsel for Respondents.

On July 16, 1975, the Eighth Circuit Court of Appeals issued a 62-page opinion that also carefully analyzed all of the additional material and arguments. The language, the legislative history and surrounding circumstances of the three Acts in question were considered in light of the guidance of *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), and most recently *DeCoteau, supra*. The court found that it was:

> clear beyond reasonable question that the Acts were passed with the intent of doing away with the Reservation in those portions affected . . . the problems before Congress at the turn of the century with respect to the western lands permitted no easy solutions. The choices were difficult but they were made by the representatives of the people and it is not our function to fashion a wiser course under the guise of interpretation. Pet. App. A at 60-61.

At the outset, it was again noted that the decision of the court only maintained the status quo for the reason that since the passage of the Acts in question, all interested parties had, as in *DeCoteau*, recognized the jurisdiction of the state therein. Pet. App. A at 3-4, n. 5.

After the decision was announced, counsel for Petitioner indicated to Respondents that for strategical reasons a petition for rehearing en banc would not be filed. Reportedly, the likelihood of this Court granting a Petition for Certiorari, which was soon to be filed in any event, would be increased if the Eighth Circuit Court of Appeals had not previously acted upon and denied a petition for a rehearing en banc. The denial of the rehearing petition was assumed on the strength of the opinion of the Eighth Circuit Court of Appeals. On July 31, 1975, the time for filing such a petition expired.

However, by September 3, 1975, some event must have caused a general change in philosophy. By letter of that date, the clerk of the Eighth Circuit Court of Appeals received a 110-page document from the Land and Natural Resources

Division of the Department of Justice that was to serve, among other purposes, as an enlarged brief for the Government as *Amicus Curiae* in support of Petitioner's request for a rehearing en banc. Six days later, on September 9, 1975, by way of a letter dated September 6, 1975, the clerk of the Eighth Circuit Court of Appeals received the motion of Petitioner for leave to file the accompanying enlarged petition for a rehearing en banc out of time. By order of the court dated September 16, 1975, the motion was denied. Contrary to Rule 23(1)(a)ii and Rule 23(1)(j) of this Court, no mention of these facts or orders appear anywhere in the Petition or in the Appendix.

Up to and including the date of the denial of the petition for rehearing en banc, the issue now presented in this Petition was before the district court and the court of appeals for consideration for over three years. Fourteen separate briefs, a total of 560 pages, and over 640 pages of appendices, were presented in support of the arguments of the respective parties. Both courts unequivocally, in well-reasoned and well-documented opinions, found the position of Petitioner and the Government to be clearly untenable and contrary to the language, legislative history and surrounding circumstances of the Acts in question.

The majority of the affirmative arguments of Petitioner and the Government, although sophisticated, were variously treated and described by the courts below as:

> . . . not in point . . . misapprehends the applicable criteria . . inconclusive and unpersuasive . . . cannot accept . . . nowhere do we find, in the legislative history or materials from the period, any indication in substantial support . . . we cannot ignore the legislative history . . . the argument made will not withstand analysis in light of the realities of the situation confronting the Congress at the time . . . the record is barren of any disclosed intention thereby to preserve intact the area of the original reservation and its boundaries. Such an intention is

> utterly foreign to the entire tenor of the contemporary materials before us . . . the argument stems from a misinterpretation of legislative history . . . . Pet. App. B at 83. Pet. App. A at 6, 8 n. 8, 15 n. 21, 26, 30, 31, 33, 42, 54.

In other instances, the courts below simply noted "no explanation" whatsoever was even "offered" by the Petitioner or the Government on crucial points such as why the Senate and House Reports and the sponsors of the legislation would in 1910 and 1911 describe the Rosebud Reservation as being *"diminished,"* containing *"one million acres of land,"* and *"lying wholly within the boundaries of Todd County,* South Dakota," if the original 1889 boundaries, which contained over three million acres of land and encompassed most of the five separate counties, were still intact as the Tribe and the Government nevertheless maintained. Pet. App. A at 51.

Significantly, the position of Petitioner before this Court remains the same. There is nothing in the Petition that was not presented and rejected by both courts below. Petitioner does not even assert that one new argument or material revelation has surfaced subsequent to the decisions of the courts below. Nor does this Petition offer this Court the heretofore conspicuously absent alternative constructions to the over forty separate and unequivocal references in the language, legislative history and surrounding circumstances of the Rosebud Acts that effectively undermine the crux of the theory upon which the Position of Petitioner is founded. Quite simply, the position of Petitioner is that after three years and 1200 pages of documentation and argument, both courts below were for some reason incapable of accurately ascertaining the intent of Congress and the understanding of the Rosebud Sioux Tribe.

Although this position is clearly untenable, Respondents will not attempt, within the confines of this Brief, to once again set forth the language of the documents to refute each and every argument that is once again presented in the Petition. Nor will Respondents quote in length the same unequivocal references yet to be addressed by Petitioner that were deemed extremely significant by the courts below. On these points, Respondents will rely solely upon the persuasiveness of the opinions below, both of which set forth the substance of the documents as clearly and concisely as it was possible to do in a written opinion.

Insofar as the facts of the case are concerned, Respondents will simply rely on the following summary of the historical climate in which the Rosebud legislation was proposed — a summary that reveals unequivocally and without reservation that the Rosebud legislation fits squarely within the same historical circumstances and congressional intent that this Court found to exist in *DeCoteau.* Petitioner has elected to set forth another version of the context in which the Rosebud legislation was enacted within a sixteen-page "Statement of Facts." Pet. at 2-17. Because Respondents find it difficult to address the position of Petitioner within what might properly be deemed a statement of facts, the entire sequence *infra* is presented under the first subheading of Argument.

SUMMARY OF ARGUMENT

The language, legislative history and surrounding circumstances of the three Rosebud Acts fit squarely within the historical circumstances this Court set forth in *DeCoteau.* Since the opinions of the district court and the court of appeals more than adequately set forth the specific evidence of congressional intent, Respondents have concentrated on the historical circumstances of the General Allotment Act of 1887, the 1891 Act construed in *DeCoteau,* and the Rosebud legislation. Respondents submit that this documentation establishes that in all respects the Rosebud legislation clearly represents a continuation of the same basic congressional policy noted in *DeCoteau.*

As in *DeCoteau,* all three Rosebud Acts are surplus land statutes enacted pursuant to what was in essence Section 5 of

the General Allotment Act. As in *DeCoteau,* a majority of the adult male members of the tribe consented to what was aptly described throughout the documents as a "cession" of the surplus unallotted land. The earliest Rosebud negotiations were also for a certain sum. However, the later negotiations were for an uncertain sum. Congress no longer favored direct appropriations to pay for the surplus area ceded. In these later negotiations, the total sum to be held in trust by the Government for the benefit of the tribe was dependent upon the number of homesteaders that would file on the surplus land. In all respects, the Rosebud documents show that the intent of Congress and the understanding of the Rosebud Sioux Tribe remained the same. Each Act was intended to disestablish a portion of the Rosebud Reservation. The court below held that the boundaries of the original Rosebud Reservation were thus diminished to encompass Todd County, South Dakota.

The decision below simply maintains the status quo. The other counties have not been considered to be within the boundaries of the original Rosebud Reservation since the passage of the Acts. Only 10 percent of the resident population are enrolled members of the Rosebud Sioux Tribe and less than 15 percent of the land remains in trust. As in *DeCoteau,* Respondents have exercised unquestioned jurisdiction over the unallotted land of the former reservation in these counties for over 65 years.

The Petition does not assert one new argument or material revelation subsequent to the decisions below. Nor does the Petition offer this Court alternate constructions to the references in the language, legislative history and surrounding circumstances of the Rosebud Acts which clearly undermine the theory of Petitioner. Rather, the thrust of the Petition is simply that after three years of extensive research and briefing, both courts below were, for some unstated reason, incapable of accurately ascertaining the intent of Congress and the understanding of the Rosebud Sioux Tribe.

The decision below is in accordance with established state and federal precedent. It is not of broad general importance in Indian Law. Nor is it in conflict with any decision of this Court, any decision of any other circuit or any decision of the Supreme Court of the State of South Dakota. In short, it does not present a question worthy of the discretionary jurisdiction of this Court.

ARGUMENT

I

THE DECISION BELOW FITS SQUARELY WITHIN THE HISTORICAL CIRCUMSTANCES THIS COURT SET FORTH IN *DECOTEAU V. DISTRICT COUNTY COURT,* 420 U.S. 425 (1975).

A. The General Allotment Act of 1887. Before 1887 it was the fundamental precept and purpose of the Indian land cession policy that the ratification of a cession agreement would extinguish the Indians' claim or title to a given described area. If the ceded area, or area to be disestablished, included only a portion of the reservation, the boundaries would be diminished to include only the reduced area or reservation remaining. If the whole reservation was to be ceded or disestablished, the boundaries were still just as disestablished, and the tribes involved usually were required to remove to another reservation. In both instances the area so ceded was automatically restored to the public domain and later "opened" to homesteading. In this era the stated consideration was usually a direct per capita cash payment to the tribe or individual members thereof.

After 1887, through Section 5 of the General Allotment Act of 1887 and by tailoring cession agreements to conform thereto, Congress could and did effectively reduce the size of Indian reservations at a much more rapid pace than had theretofore been possible. The Commissioner of Indian Affairs addressed the issue at length in terms of letting "the

reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away." Report of the Commissioner of Indian Affairs at 136 (1892). The Report stated that under Section 5 of the General Allotment Act "during the past three years more than 24,000,000 acres of Indian land have been restored to the public domain." Report of the Commissioner of Indian Affairs at 136 (1892). In two respects, however, the post 1887 legislation differed materially from the past.

Prior to enactment, the individual members of the tribes were assured under the General Allotment Act of individual acreages in the form of individual allotments. These allotments were pursuant to Section 5 of the General Allotment Act, as were the negotiations for the remainder or "surplus" lands. The term "surplus land statute" was used to describe the entire process subsequent to allotment. Secondly, those primarily responsible for the General Allotment Act professed sincere belief that the individual member of a tribe who had received an allotment, as well as the government, would be better off after a surplus land statute was enacted. The allotted member of the tribe would be exposed to "civilization" and this exposure was deemed a necessary step toward the status of citizenship. The sale of the surplus land would create a fund which would serve as a source of income for the allottee until that status could be fully obtained. Moreover, the government would at the same time be making available for cultivation vast tracts of land that had theretofore been lying idle. The allottee and the homesteader could both cultivate the land and, as a result, the entire country would thus be the beneficiary. In retrospect, both the goals of the act and some of the motives behind it may be questionable, but at the time it was wholeheartedly accepted in good faith by all.

For one concrete example of a surplus land statute enacted pursuant to Section 5 of the General Allotment Act, assume that a certain cession or sale for the entire eastern half of a

reservation was proposed in 1888, but only a certain percentage of the members of the tribe had as of that date received an allotment. If this proposal nevertheless met with the approval of the Commissioner of Indian Affairs, he would write the Secretary of the Interior and therein cite Section 5 of the General Allotment Act which provided:

> And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to *negotiate* with such Indian tribe for the *purchase and release* by said tribe, in conformity with the treaty or statute under which such reservation is held, *of such portions of its reservation* not allotted as such tribe shall, from time to time, consent to *sell,* on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which *purchase* shall not be complete until ratified by Congress, . . . Act of February 8, 1887, 24 Stat. 389-390 (emphasis added).

Paraphrased for the purpose of the hypothetical example, this section would allow the Secretary to negotiate for the release of "such portions" of the reservation not allotted, irrespective of the fact that only a certain percentage of allotments had yet been made, and these were scattered throughout the entire reservation. If the Secretary concurred, he would appoint either one or several commissioners and ask that the Commissioner of Indian Affairs submit a "Draught of Instruction" for his approval. After approval, the instructions would be forwarded to the appointees. In most instances the information contained therein was of a very general nature.

The Commission would go to the reservation, negotiate the cession for the surplus lands and draw up an agreement for the approval of the tribe containing the price per acre, and certain other specifics, such as the total amount of money,

the certain sum, the United States was to pay for the area ceded. This fund was to be held in trust for the benefit of the tribe specifically pursuant to Section 5 of the General Allotment Act. The entire agreement would not be effective until ratified by Congress, again, pursuant to Section 5 of the General Allotment Act. In Washington the agreement would be amended by Congress to provide that the surplus land so sold or released by the tribe to the United States was required to be held by the United States for the sole purpose of securing homes to actual settlers if it was adoptable for agricultural purposes, again, pursuant to Section 5 of the General Allotment Act. Finally, the agreement would describe or separate the eastern half or surplus area ceded, by some boundary marker or other survey from that portion of the reservation unaffected by the cession, the western half.

In all agreements of this type this was, in fact, the case. The surplus part of the reservation had been ceded and would soon thereby become essentially a part of the public domain and be opened to homesteading upon amendment and ratification by Congress and proclamation by the President. The other part would remain intact and be referred to as the diminished reservation, or the remaining reserve, or just the reservation. As for those individuals whose allotments were now soon to be situated in the newly created public domain, they were usually given the option to remain so situated or to relinquish their allotment and remove to the diminished reservation and reselect therein. At a later date, this whole process was sometimes repeated again and again on the same reservation. The original reservation would be repeatedly reduced in size over and over, with the ceded area restored to the public domain and opened to actual homesteaders. Many of the members of the Tribe would elect to remain so situated.

Of course, in this hypothesis there would be no question as to the effect of the agreement as ratified on the boundaries of the original reservation. With each opening there would of

necessity be a proper delineation of the area opened from the area remaining or the diminished reservation. Most often this delineation was some type of metes and bounds description because in this period either the territory or the states involved had not been surveyed into distinct county subdivisions, or the surplus area agreed to be ceded was not in conformity therewith. In some cases the "cession" or similar terminology would appear in the text of the act and in others it would not. In some cases the "public domain" terminology would appear in the text of the act and in others it would not. In some cases the "diminished reservation" terminology would be repeatedly referred to in the text of the act and in others it would not.

In any event, boundary questions over agreements of this type from this era would not have been difficult for this Court to dispose of because of the fact that only a portion of the reservations were opened and there existed enough documentation related to the remaining or diminished reservation to resolve the issue. However, when the agreement provided for a cession of all of the unallotted surplus land of the reservation, the question of what effect Congress intended was much more difficult. This was precisely the situation presented in *DeCoteau*.

B. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). The General Allotment Act permeated the documents which were presented to this Court in *DeCoteau*. Once presented, however, it took only one paragraph to put the entire sequence outlined above in perspective:

> In 1887, the General Allotment Act (or Dawes Act) was enacted in an attempt to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands. The Act empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit.

> **Against this background, a series of negotiations took place in 1889 with the objective of opening the Lake Traverse Reservation to settlement.** *DeCoteau, supra* at 432-433.

As the *DeCoteau* opinion makes clear, the fact situation therein was by no means atypical. Throughout the western United States many local communities were requesting that surplus reservation lands be made immediately available for farmers, merchants and railroad development. Most of the members of the tribes had already received their allotments. To act with expediency would be to act in the best interest of all concerned. *DeCoteau, supra* at 431-432. These were the "familiar forces" that began to work upon many of the reservations. *DeCoteau, supra* at 431. Surplus land statutes pursuant to Section 5 of the General Allotment Act were the vehicles through which the overall process was channelled.

In *DeCoteau*, the initial request from the local community was for "the opening of the reservation." Letter, *DeCoteau, supra* at 431, n. 8. The Secretary of the Interior requested that a set of instructions be drafted "for the guidance of a Commission . . . to negotiate with the Sisseton and Wahpeton Indians for the sale of their surplus lands." The purpose, as per the instructions, was for "negotiating with the Sisseton and Wahpeton Indians for the relinquishment of such portions of the Lake Traverse Reservation, not allotted as said Indians may consent to release." Instructions, *DeCoteau, supra* at 434, n. 13. The negotiations were expressly stated to be pursuant to Section 5 of the General Allotment Act. *DeCoteau, supra* at 434.

Although it was noted that it might be "inadvisable" to include all of the unallotted surplus land in the transaction, the operative language of the final cession agreement provided for precisely that:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby *cede, sell, relinquish, and convey to the United States all their claim, right,*

> *title, and interest in and to all the unallotted lands* within the limits of the reservation . . . . Act of March 3, 1891, 26 Stat. 1035 (emphasis added).

Apart from the amount of land involved, the operative cession language of this surplus land statute was typical. [1]

In terms of ratification, Section 5 of the General Allotment Act further stated that the cession or sale should be "in conformity with the treaty or statute under which such reservation is held." Act of February 8, 1887, 24 Stat. 390. The Commissioner of Indian Affairs had earlier noted that "no provisions regarding the *cession* or relinquishment of the reservation or any portion thereof" could be found in the 1867 treaty creating the Lake Traverse Reservation as a permanent reservation. Instructions at 2, *DeCoteau, supra* at 434, n. 13 (emphasis added). It was therefore concluded that the consent of a majority of the adult male members of the Sisseton-Wahpeton Tribe should suffice. Instructions at 2, *DeCoteau, supra* at 434, n. 13. After two weeks of prolonged negotiations, the formal signed consent of this number of the adult male members of the tribe was obtained.

Before the Sisseton-Wahpeton cession agreement was presented to Congress for ratification, the Government negotiators first presented a rather detailed report to the Commissioner of Indian Affairs. In the report, specific explanations for certain provisions and other recommendations were made. A short time later the entire package, i.e. the agreement, the council transcripts, the report and the official recommendations, was forwarded to Congress. The agreement was then reported with certain amendments and others were later added via the congressional debates.

As passed by Congress, the 1891 Sisseton-Wahpeton Act recited verbatim and ratified the 1889 Agreement. Act of

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1. *See, DeCoteau, supra* at 439, n. 22, for the minor variation in the operative cession language of the other agreements ratified by the Act of March 3, 1891.

March 3, 1891, 26 Stat. 1035. Parts of Section 26, all of Sections 27, 28, 29 and Section 30, as well as the two omnibus provisions, Section 35 and Section 38, were amendments to the original 1889 Agreement. *DeCoteau, supra* at 441, 446, n. 33. The first amendments dealt with the preamble (Section 26), the certain sum appropriated (Section 27), the lands occupied by religious or other organizations (Section 28), the authority pursuant to the General Allotment Act for additional allotments prior to the opening (Section 29), and the homestead provision and school lands provision (Section 30). The omnibus provisions were directed to the lands occupied by the religious or other organizations and the school lands grant. Section 35, Section 38, 26 Stat. 1035.

After a sufficient period of time had elapsed to enable the completion of the necessary allotment and other administrative details, the Proclamation of President Harrison in April, 1892, declared that the lands "be opened to settlement." Proclamation of the President, April 11, 1892, 27 Stat. 1017. With this Act and Proclamation the exterior boundaries of the Lake Traverse Reservation were necessarily disestablished and the allotments therein placed in what was in essence the midst of the public domain. *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

Significantly, the precise effect of the 1891 Act on the Lake Traverse Reservation was not readily apparent in the *DeCoteau* documents. As the Court noted, the members of the Sisseton-Wahpeton Tribe had elected to cede all of the unallotted surplus lands. In this situation, there was no "carving out of a diminished reservation" for anyone to be concerned with and hence a probative source of documentation in terms of the issue presented was a factual impossibility. There were no direct references to what would remain after the ratification of the agreement by either the government or the members of the Sisseton-Wahpeton Sioux Tribe. Thus, in order to accurately ascertain the intent of Congress, this Court had to establish the proper historical perspective from

which to view the events in question. The perspective was the overall purpose of the General Allotment Act and the surplus land statutes enacted pursuant thereto. It was "against this background" that the Act in question took place. *DeCoteau, supra* at 432. These were the "familiar forces" at work in *DeCoteau*.

Once this perspective was established, the issue was convincingly resolved. In both respects the task of the courts below was far less difficult. In the first place, none of the Rosebud Acts in question were concerned with all of the surplus unallotted lands of the Rosebud Reservation. Here was a prime example of where the government and the tribe had over a period of six years "carved out a diminished reservation." *DeCoteau, supra* at 447. Secondly, and more importantly, *DeCoteau* had already established the proper historical perspective from which the Eighth Circuit Court of Appeals could view the issue if the facts remained essentially the same. As the following sequence reveals, there is no question as to whether the facts remained the same. In less than ten years after the 1891 DeCoteau Act, the same "familiar forces" were felt on the Rosebud Reservation and Congress reacted in the same manner as outlined above.

C. Rosebud Legislation.

1. The Act of April 23, 1904, Gregory and Lyman Counties, South Dakota. Because the original Rosebud Reservation was not delineated as such until the Act of March 2, 1889, 25 Stat. 888, certain provisions of the General Allotment Act of 1887 were actually incorporated verbatim therein. In terms of the question presented, only Section 12 of the 1889 Act need be set forth at length.

> Sec. 12. That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner, if in the opinion of the President it shall be for the best interest of said tribe, it shall be lawful for the Secretary of the Interior to *negotiate* with such Indian tribe for the *purchase*

> *and release* by said tribe, in conformity with the treaty or statute under which said reservation is held of *such portions of its reservation* not allotted as such tribe shall, from time to time, consent to *sell*, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until *ratified* by Congress . . . . Act of March 2, 1889, 25 Stat. 888 (emphasis added).

As is readily apparent, Section 12 of the 1889 Act is the same as the Section 5 of the General Allotment Act under which the surplus land statute construed in *DeCoteau* was initiated, negotiated, amended and finally ratified. *See* Section 5 at 7, *supra*. This fact accounts for the reason that the format of the initial Rosebud negotiations parallels that found to exist in *DeCoteau*. The "familiar forces" were one and the same.

In Rosebud, as in *DeCoteau*, "a nearby and growing population of farmers, merchants and railroad men began urging authorities in Washington to open the reservation to settlement." *DeCoteau, supra* at 431. In 1898 Gregory County, South Dakota, was organized with a large portion of the area lying within the Rosebud Reservation. Soon thereafter, the resident population began urging Washington to act so that this portion of the "reservation could be opened and opportunity given for settlement and development of that region of the state." R. A. App. II, Doc. 1 at 1. A proposed extention of the railroad added to the feasability of the project. General statutory authorization for the Secretary of the Interior "to *negotiate* through any United States Indian Inspector, agreements with any Indians for the *cession* to the United States of portions of their respective reservations or surplus unallotted land" followed shortly thereafter. R. A. App. II, Doc. 2 at 1 (emphasis added).

On March 19, 1901, a United States Indian Inspector, James McLaughlin, was instructed by the Commissioner of Indian Affairs to commence "*negotiations* with the Indians of

the Rosebud reservation, in South Dakota, for the *cession* of the unallotted eastern portion of their reserve." R. A. App. II, Doc. 2 at 1 (emphasis added). The Commissioner further noted that:

> To preserve the regularity of the reservation boundary in the event that a *cession* is made, the townships east of the western boundary line of Gregory County in range 100 to wit, fractional township 71 and townships 72 and 73 lying in Lyman County, should also be ceded. R. A. App. II, Doc. 2 at 2 (emphasis added).

As in *DeCoteau*, the Inspector proceeded to the reservation, negotiated the cession for a certain sum and obtained the formal signed consent of three-fourths of the adult male members of the Rosebud Sioux Tribe. The operative language of the certain sum agreement is, in substance, identical to the Sisseton-Wahpeton Agreement:

> The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby *cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted*, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: . . . R. A. App. II, Doc. 3 at 28 (emphasis added).

As in *DeCoteau*, the Inspector prepared a report that accurately portrayed the negotiations to date:

> Under instructions contained in Department letters of the respective dates of March 21 and May 21 last, and Indian Office inclosures, I have the honor to transmit herewith an agreement, dated September 14, 1901, entered into by me, as United States Indian inspector, on the part of the United States, with the Indians of the Rosebud Agency, S. Dak.,

> by which the said Indians *cede* to the United States their surplus or unallotted lands lying within the boundaries of Gregory County, S. Dak., approximating 416,000 acres, for a consideration of $1,040,000. R. A. App. II, Doc. 3 at 5 (emphasis added).

Before this Court even Petitioner now openly concedes that had Congress ratified the substance of this 1901 Agreement, there would have been no question to present. Pet. at 14. In light of *DeCoteau*, the substance of the concession is a foregone conclusion. However, prior to *DeCoteau* and the order of the court below that directed that supplementary briefs be filed on the appiicability and effect of the same, the position of Petitioner as a matter of record was by no means so candid. At best, the argument of Petitioner could be described as in the alternative.

At one stage of the proceedings below, both Petitioner and the Government seemed to be relying upon the General Allotment Act of 1887 as the point in time that marked a departure in terms of a continued congressional policy that disestablished portions of reservations. In essence, the arguments were similar to those presented by the Government in *DeCoteau*. According to the Petitioner and the Government, surplus land statutes pursuant to the General Allotment Act were never intended to have this effect. But this was prior to *DeCoteau*. The Act in *DeCoteau* was a surplus land statute pursuant to the General Allotment Act. It did disestablish the reservation.

After the holding in *DeCoteau* and because of the absence of any specific support in the 1901 Rosebud documents evidencing a departure in policy, the arguments had to be cast aside. New arguments were immediately formulated and tailored to certain events subsequent to the 1901 Rosebud agreement — events that Respondents submit were not even related to the question presented, but were, nevertheless, the

last possible refuge for a position that had been established to be clearly untenable. [2]

The crux of this new position is founded upon the fact that subsequent to the time the 1901 Agreement was presented for ratification, Congress balked at the "certain-sum-in-trust" surplus land statutes that required direct appropriations of large amounts of tax dollars to pay for the areas in question. As a result, another method was decided upon whereby payment could be made directly by the homesteaders filing upon the surplus land. This amount would then be credited in trust for the benefit of the tribe in the same manner that the certain-sum-in-trust, which the government had previously appropriated, was so credited.

The method, termed the "uncertain-sum-in-trust" method by the courts below, according to Petitioner and the Government, *now* represents the point in time that marked a "gross departure" in terms of a continued congressional policy of disestablishing portions of reservations. Statutes which incorporated this provision, according to Petitioner and the Government, were "designed for a different purpose" in terms of the question presented below. Brief for Appellant below at 43, 49. In an attempt to bolster this argument, Petitioner has even redefined surplus land statutes to include only those statutes that contain the uncertain-sum-in-trust provision. Pet. at 5, 17, 19. Thus, according to Petitioner, the 1891 Act in *DeCoteau* was *not* a surplus land statute. Within this new definition, Petitioner can without hesitation now state:

> This is the first case in which any Federal Appellate Court has held that a 'surplus' land statute disestablished a reservation. Whenever the question has been presented, this Court has held that sur-

2. Certain elements of the new arguments were presented earlier in the proceedings below. Primarily these elements were used as alternatives to the General Allotment Act argument. At times, however, they were joined with the General Allotment Act argument. In this respect the arguments below were unclear to Respondents.

> plus land statutes do not operate to terminate the reservation status. Pet. at 19.

After *DeCoteau* the Government did change its argument in the court below and adopt the "gross departure" position of Petitioner. But the new definition of a surplus land statute was another matter entirely. Even the Government refused to adopt this argument.

Both the new definition and the new purpose are contrary to *DeCoteau* and two decades of General Allotment Act legislation. The courts below rejected the innovative arguments of Petitioner and the Government for the reason that the same sources that made clear the purpose, understanding and intent of the surplus land statute construed in *DeCoteau*, made it equally clear that the purpose, understanding and intent of the surplus land statutes presented in Rosebud remained the same: the language, legislative history and surrounding circumstances of the Acts in question. Even the manner in which the proposition was again presented to the Rosebud Sioux Tribe unequivocally confirms that this was in fact the case.

On June 30, 1903, Inspector McLaughlin was instructed to return to the Rosebud Reservation. Significantly, the instructions still explicitly stated that his trip was "for the purpose of *negotiating* a new agreement with the Indians thereof for the *cession* of the unallotted portion of their reserve embraced in Gregory County." R. A. App. II, Doc. 10 at 1 (emphasis added). In open council Inspector McLaughlin presented the proposal to the tribe in the same manner: "I am here to enter into an agreement which is similar to that of two years ago, *except* as to the manner of payment." R. A. App. II, Doc. 11 at 21 (emphasis added).

After the members of the tribe had debated and considered the new proposal, another *cession* agreement incorporating the "uncertain-sum-in-trust" provision was drafted. Significantly, the operative language of the new agreement was identical to that of the agreement concluded in 1901:

> That said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereafter named, do hereby *cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Reservation now remaining unallotted,* situated within the boundaries of Gregory County, South Dakota, described more particularly as follows. R. A. App. II, Doc. 12 at 1 (emphasis added).

By the date of the last council, a majority of the adult male members of the Rosebud Sioux Tribe formally consented and signed the new agreement.

In his Report to the Secretary of the Interior, Inspector McLaughlin again accurately portrayed what is reflected throughout the council transcripts. In terms of the question presented the Report simply stated:

> I have the honor to report the result of my negotiations with the Indians of the Rosebud Reservation, South Dakota, for the *cession* of their unallotted land in Gregory County, South Dakota. R. A. App. II, Doc. 13 at 1 (emphasis added).

With the recommendation of the Secretary of the Interior and the Commissioner of Indian Affairs, Congress added the substance of this *cession* agreement by amendment to the original 1901 *cession* agreement and, as in *DeCoteau*, it was then recited and ratified in the 1904 Act. Insofar as the Rosebud Reservation is concerned, if the 1904 Act was "designed for a different purpose," that purpose never surfaces in the Rosebud documents. On May 13, 1904, President Roosevelt proclaimed the surplus unallotted land in the counties "as aforesaid ceded . . . opened to entry and settlement." Proclamation of the President, May 13, 1904, 33 Stat. 254.

In the court below Petitioner stressed the fact that three-fourths of the adult male members of the Rosebud Sioux

Tribe had not formally consented and signed the substance of the 1904 Act. The Treaty of 1868 stated that this was a prerequisite to the validity of any future *cession* and only a *majority* of the members of the tribe had formally consented and signed the 1903 agreement. According to Petitioner initially, the cession language and indeed, the entire format of the 1904 Act was a "dirty trick" devised by the Commissioner of Indian Affairs, the Secretary of the Interior, and Congress — a "pretense," a "camouflage," a "front to give the statute the face of an *agreed* transaction." Brief for Appellant below at 18, 31, 43. This was the reason why the Commissioner of Indian Affairs, the Secretary of the Interior and Congress retained all of the methodology of the *cession* era, which was utterly inconsistent with the position of Petitioner that the "uncertain-sum-in-trust" statutes were "designed for a different purpose." Apart from the fact that the position of Petitioner was self-defeating in that the 1868 Treaty provision was directed to the very *cession* policy that disestablished portions of reservations, which Petitioner maintained had since been abandoned by the adoption of the uncertain-sum-in-trust provision, the dirty trick argument was expressly refuted in the Rosebud documents.

In 1903 this Court decided *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). On fundamental *constitutional* grounds, *Lone Wolf* specifically recognized that Congress could, in good conscience and for the benefit of the entire country, as well as the individual members of the tribe, enact legislation of this nature *without* formally complying with an identical provision in another treaty that was said to have also required the formal consent of three-fourths of the adult members of other tribes on another reservation. The *Lone Wolf* decision is repeatedly cited, analyzed, explained and relied upon by the Commissioner of Indian Affairs, the Secretary of the Interior and Congress in the Rosebud documents. In each negotiation conducted subsequent to the decision, the members of the Rosebud Sioux Tribe received the same accurate and detailed explanation of the ramifications of *Lone Wolf*. It was fully

understood by all. Petitioner never cited or mentioned *Lone Wolf* in any of the four briefs presented to the court below, although Petitioner continually stressed the fact that only a *majority* of the adult male members of the Rosebud Sioux Tribe had consented to the Rosebud legislation.

Congress did not need the "facade" of Petitioner. In light of *Lone Wolf* it did not need even the informal consent of the members of the Rosebud Sioux Tribe, although it never acted accordingly. The premise of the dirty trick argument did not exist. Thus, the continued use of the *cession* methodology subsequent to the adoption of the uncertain-sum-in-trust provision, as in the 1903 materials *supra*, assumes an additional degree of significance. All references to the 1868 prerequisite for *cessions* are similarly inexplicable if Congress and the Tribe, as Petitioner states, did not understand or intend the Acts in question to disestablish any portion of the reservation affected. Before this Court Petitioner has abandoned part of the dirty trick argument in favor of the position that everyone involved was simply incompetent. Pet. at 32. All references of this nature in the House and Senate Reports and the *Congressional Record* are now the result of an "erroneous understanding that the land was being ceded" and the "mistaken belief that the Indians had agreed to the sale or disposition of the land." Pet. at 32. This argument, though equally untenable in light of *Lone Wolf*, does not alter either the intent of Congress or the understanding of the Rosebud Sioux Tribe. With these facts in mind, the manner in which the 1907 Act was presented to the members of the Rosebud Sioux Tribe can now be addressed. [3]

2. The Act of March 2, 1907, Tripp County, South Dakota. By June of 1906 the allotment process on yet another portion of the Rosebud Reservation had progressed to the point where

3. *See*, Pet. App. A at 34 n. 78, wherein the court noted: Since the tribe urges that the 1904 Act did not alter the boundaries, it does not contend any change of purpose as evidenced by the 1907 Act.

:he "familiar forces" referred to above were set in motion ɔnce again. This time, the surplus unallotted land in Tripp County, lying immediately west of Gregory County, was the :ocal point of attention. Again, it was Senator Gamble of South Dakota who made the initial request of the Secretary ɔf the Interior that an Inspector be detailed to enter into negotiations with the Rosebud Indians for the cession of the surplus unallotted land in Tripp County, South Dakota. R. A. App. III, Doc. 18 at 1.

By December, 1906, the administrative details were complete. The Commissioner of Indian Affairs prepared the draft of the instructions at the request of the Secretary of the Interior. R. A. App. III, Doc. 18 at 1. The substance of the proposition was again referred to as *"negotiations"* for the *"cession* of the surplus unallotted lands in Tripp County." R. A. App. III, Doc. 18 at 1 (emphasis added). On the reservation, Inspector McLaughlin presented the proposition in open council to the members of the tribe in the same manner:

> I am here under orders of the Secretary of the Interior to submit to you a proposition for the *cession* of your surplus unallotted land in Tripp County. R. A. App. III, Doc. 19 at 1 (emphasis added).

At the conclusion of many days of council, another *cession* agreement incorporating the "uncertain-sum-in-trust" provision was drafted. Significantly, the operative cession language of the 1906 Agreement was identical to that of the original "certain-sum-in-trust" agreement concluded in 1901:

> The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration herein named and in the manner hereinafter provided, do hereby *cede, grant, and relinquish to the United States, all claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation* lying south of the Big White River and east of range 25 west of the sixth principle meridian in South Dakota, except such portions thereof as have been, or may hereafter be, allotted to Indians. R. A. App. III, Doc. 21 at 5 (emphasis added).

Here, as was the case in 1903, the majority of the adult male members of the Rosebud Sioux Tribe again formally consented and signed the new agreement.

It is again important to note that the Department of the Interior was fully aware of the decision of *Lone Wolf*. Indeed, the instructions to Inspector McLaughlin discussed the ramifications of the decision in detail. R. A. App. III, Doc. 18 at 9. In terms of standard operating procedure, the Commissioner of Indian Affairs placed *Lone Wolf* in the following perspective:

> I have heretofore said in substance that, in my judgment, it is a mistake for Congress to direct the restoration of the surplus lands of an Indian reservation to the public domain *without* first referring the question to the Indians . . . Letter from F. E. Leupp, Commissioner of Indian Affairs to the Secretary of the Interior, December 15, 1906 (emphasis added).

There is little doubt that the Department acted accordingly.

In the Senate, as the court below pointed out, the 1906 Agreement was initially recited and presented for ratification in the same form as the 1904 Act at the specific recommendation of the Commissioner of Indian Affairs. Pet. App. A at 36. Because the House had already acted on another bill in a different form, however, the Senate version was eventually tabled. The operative language of the new House version was equally suited to effect the same result. It provided:

> To *sell or dispose of all that portion of the Rosebud Indian Reservation* in South Dakota lying south of the Big White River and east of range 25 west of the sixth principle meridian, except such portions thereof as have been, or hereafter be, allotted to Indians. Pet. App. C-2 at 121 (emphasis added).

Insofar as the reason for the departure in terms of the format of the legislation, Congressman Fitzgerald simply noted that it had not been the practice to use the cession format for several years. Pet. App. A at 37, n. 72. The bill became law on March 2, 1907, and as such it was still, as in *DeCoteau,* a surplus land statute pursuant to what was in essence Section 5 of the General Allotment Act of 1887. On August 24, 1908, President Roosevelt Proclaimed the surplus unallotted land in Tripp County "opened to settlement." Proclamation of the President, August 24, 1908, 35 Stat. 2203.

The specific evidence of the effect of the 1907 Act on the Rosebud Reservation is sufficiently set forth in the opinions below. It need not be repeated here. It is sufficient to note that the "uncertain-sum-in-trust" provision deemed to be significant by Petitioner and the Government did not merit the attention of a single individual in terms of the question presented. In all material respects, the scope and purpose of the 1907 Act remained the same.

3. The Act of May 30, 1910, Mellette County, South Dakota. By the time the next portion of the Rosebud Reservation, Mellette County, was made ready for similar legislation, Congress had adopted the position that it was no longer necessary to *formally* obtain the signed consent of a majority of the members of any tribe prior to congressional action. As a result, although Inspector McLaughlin was again detailed to the Rosebud Reservation to conduct both informal and formal councils for negotiations, these councils were not for the purpose of obtaining a signed cession agreement as in the past. In all other respects, the methodology of the negotiations remained essentially the same.

The initial request for the Mellette County legislation again originated with Senator Gamble of South Dakota, who drafted a bill with operative language along the lines of the "sell and dispose" terminology of the 1907 Tripp County Act. In Senator Gamble's words, Inspector McLaughlin was "to use the bill as a basis for an *agreement* looking to the *cession*

of the lands in question." Letter from Congressman Burke to R. A. Ballinger, Secretary of the Interior, June 9, 1909 (emphasis added). On the reservation, Inspector McLaughlin presented the proposition in a similar manner:

> Inspector McLaughlin. My friends, this is the fifth time that I have *negotiated* with you for lands, and I have been here so often with respect to the *cession* of lands, that my friend High Pipe, has given me the name of 'the man who bothers his friends for more land.' R. A. App. III, Doc. 28 at 3 (emphasis added).

The other members of the tribe viewed the proceedings in the same light as High Pipe. This was to be another *cession* of land. Nor did they perceive any difference in this respect between the proposed "certain-sum-in-trust" cession of 1901 and the "uncertain-sum-in-trust" cession that was now before them. The same 1868 cession prerequisite was again discussed in three separate phases of negotiations. Contrary to the overall position of Petitioner and the Government, none of the changes that had evolved since 1901 were yet elevated to the level of a distinction, at least insofar as the Rosebud Reservation was concerned.

In the report on the negotiations, Inspector McLaughlin noted that again "a large *majority* of the Indians of the Rosebud reservation and more particularly nearly all of the younger men" were in favor of the proposition. R. A. App. III, Doc. 29 at 4 (emphasis added). In the final draft of the bill that would eventually become the 1910 Act, the area in question was succinctly described in terms of the "tract ceded." Pet. App. C-3 at 124. The portion of the reservation that was to remain intact was described as the "diminished reservation." Pet. App. C-3 at 124. This and similar cession and sale terminology also appears throughout the congressional debates. On May 30, 1910, the legislation was signed by President Taft and on June 29, 1911, it was Proclaimed "opened to settlement." Proclamation of the President, June 29, 1911, 37 Stat. 1691.

4. The Todd County Documents. With the passage of the 1910 Rosebud Act and the opening of Mellette County to settlement, the decade of Rosebud legislation presented for construction is officially closed. One of the counties within the original confines of the Rosebud Reservation remained intact. This was Todd County, an area containing approximately one million acres and located in south-central South Dakota. Both the district court and the court of appeals found that as a result of the three Acts in question, the boundaries of the Rosebud Reservation encompass Todd County and only Todd County. The foregoing materials have not been set forth to substantiate these decisions in terms of specific evidence of congressional intent. Most of the material evidencing that intent is cited in the text of the opinions. In *Rosebud,* as in *DeCoteau,* however, the perspective from which the material is viewed is of the utmost importance. It is the position of Respondents that the opinion of the Court in *DeCoteau* contains the proper perspective from which the Rosebud legislation should be viewed. The foregoing was intended only to substantiate this position.

Prior to each of the three Rosebud Acts, a *majority* of the adult male members of the Rosebud Sioux Tribe consented to what was aptly described as a *cession. Whether all three negotiations formally resulted in cessions is not in issue.* The three Rosebud Acts are surplus land statutes pursuant to what is in essence Section 5 of the General Allotment Act. Here, as in *DeCoteau,* all three Acts are appropriate vehicles to carry out the intent of Congress and understanding of the Rosebud Sioux Tribe.

It should be noted that Petitioner has elected to also include within the "Statement of Facts" an attempt in 1911 toward additional legislation affecting Todd County. If the proposed legislation had not died after passing the Senate, Petitioner posits that "according to the decision below, there would be no Rosebud Reservation." Pet. at 14-15. In other words, if the court below was correct in its construction of the

three Rosebud Acts, the fourth act would have effectively disestablished the reservation. The end result would then have been on all fours with *DeCoteau,* if the decision of the court below was correct. Although only the Senate passed the proposed legislation, it is significant that the Todd County documents unequivocally support this position.

As early as 1909, the Acting Commissioner of Indian Affairs received inquiries relative to the disposition of the surplus unallotted land in Todd County. In one response, the Commissioner stated:

> No legislation has been enacted providing for the opening of Meyers [Todd] County, South Dakota, and *until* provision has been made for such opening that county will remain a part of the Rosebud Reservation. Letter from Acting Commissioner of Indian Affairs to W. W. Rankin, March 24, 1909 (emphasis added).

In 1911, the Todd County legislation was introduced and Inspector McLaughlin was again detailed to conduct the negotiations. In the negotiations there was no question that the members of the tribe were decidedly *opposed* to the proposition. In his report the refusal of the tribe to consent to the proposition was noted by Inspector McLaughlin with the recommendation that "the public interest would not be seriously affected" if the legislation was "deferred for a year or two." R. A. App. III, Doc. 38 at 4. Because of this recommendation, which was based on the noted opposition of the members of the Rosebud Sioux Tribe, the Todd County legislation was eventually tabled in the House of Representatives.

The following are representative excerpts from the Todd County documents that Respondents presented in detail to the court below. The "familiar forces," the cumulative effect of the three Rosebud Acts, the manner in which the members of the Rosebud Sioux Tribe understood the same and the

significance of tribal consent once withheld are all persuasively documented herein by the same individuals that participated in the decade of Rosebud legislation.

1. Todd County Documents: Senator Gamble.

The area proposed to be opened comprises *all the remaining lands within the Rosebud Reservation.* Conditions are such on this reservation I believe it would be greatly to the advantage of the Indians should the lands be open to settlement. Railway extensions are in prospect in this part of the state. The opening of the lands would encourage and I believe make certain such extension. The development of this part of the state has been greatly retarded in consequence so much of the lands being held *within* Indian reservations, and I regard it a matter of the utmost importance to the development and growth of the state that the lands be thrown open to settlement at the earliest practicable date consistent with the best interest of the Indians. I know of no substantial reasons why such conditions do not now exist. Letter from Senator Gamble to the Secretary of the Interior, April 12, 1911 (emphasis added).

2. Todd County Documents: Senate Report.

In the opinion of your committee the surplus and unallotted lands are unnecessary for the use of the Indians and the opening of *the* reservation will result in a large increase in the settlement and development of that part of the State and will, to a very large extent, enhance the value of the holdings of the Indians. Your committee regards it as of the highest importance, not only to the Indians themselves but to the people of the State and to the General Government, that all the surplus and unallotted lands should be open to settlement at the earliest practical date. R. A. App. III, Doc. 39 at 2 (emphasis added).

3. Todd County Documents: Council Transcripts.

Clarence White Thunder: The next time the Great Father sends his message to Congress tell him not to mention Todd County. We hold onto Todd County for fifty years.

Rueben Quick Bear: Every time you come here we give you

the land. Now we have a *small* reservation and we don't want to sell or dispose of *it* in any form.

Todd Smith: Whatever I say here about this proposition is alright and Senator Gamble will know it. Tell him that he wants to buy Todd County but Todd (Smith) won't sell it.

Louis Bordeaux: Before when you came for land I was always glad to help you because you are a friend of mine. We have given you three good counties of land. *And this last county we have, there is very little good land left in it. We have given you three counties.*

Inspector McLaughlin. I fully appreciate your feelings on this matter, knowing that *your reservation* which was a very large one a few years ago is *now reduced to the limits of Todd County,* and I can understand very well how you feel; that you are very desirous and anxious to retain this county intact. R. A. App. III, Doc. 37 at 3, 5, 8, 9, 11, 14-15 (emphasis added).

4. Todd County Documents: Report of Inspector McLaughlin.

The diminished reservation of the Rosebud Indians is now embraced in Todd County, South Dakota . . . In the past eight years the Rosebud Indians have consented to the opening of fully three-fourths of their original reservation, that is, Gregory County in 1904, Tripp County in 1909, and Mellette County, recently appraised and registered for and opened to entry April first next. *With the diminished reservation of the Rosebud Indians being now only one-fourth of this area eight years ago* . . . the Pine Ridge Indians having at present three-fourths of their original reservation intact, while the Rosebud Indians, whose reservation adjoins the Pine Ridge Indian Reservation on the east, have had their reservation *diminished* in the past eight years to *one-fourth of its original area.* They [the Rosebud Indians] *having so commendably consented to each of the three cessions of their reservation in the past eight years.*

Furthermore, the provision in the first Section of said bill, lines 10 to 14, page 2, is *superfluous,* which reads: 'That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotment in lieu thereof on the diminished reservation.'

The said Senate Bill provides for the opening of all the surplus lands of the Rosebud Reservation and *should the bill become a law there would be no diminished Rosebud reservation.* R. A. App. III, Doc. 38 at 4, 5, 6 (emphasis added).

5. Todd County Documents: The Secretary of the Interior.

The Indians are decidedly opposed to *opening the diminished reservation* at this time and that there will be but little desirable land to place on the market should the bill become a law, I have the honor to recommend that no further action be had on the bill at this session of Congress. *By successive openings within the past few years their reservation has been reduced to less than one-fourth of its original area. This leaves within the diminished reservation at this time the lands in Todd County only.* Letter from the Secretary of the Interior to Senator Gamble (emphasis added).

For the information of your committee, however, it may be pointed out that by successive openings within the past few years *this reservation has been successively reduced to less than one-fourth of its original area.* Gregory County was opened in 1904 under the provisions of the act of April 23, 1904, (33 Stat. L. 254), Tripp County, in 1908, under the act of March 2, 1907, (34 Stat. L. 1230); and Mellette County will be opened during the present year under the act of May 30, 1910 (36 Stat. L. 448), the President's proclamation therefor having been issued on June 29, 1911.

It may be said that upward of 7,000 Indians within this reservation have previously been allotted approximately 1,679,000 acres of land, of which 636,300 acres fall *within Todd County — the diminished reservation.* R. A. App. III, Doc. 39 at 4 (emphasis added).

6. Todd County Documents: Tribal Petitions in Opposition.

We protest against the opening of our last remaining portion of our once large Reservation . . . Parting with our last remnant of a reservation. We have already been deprived of the counties of Gregory, Tripp and Mellette within the last few years . . . .

We have already, since the treaty of 1889, contributed to the Government, to be opened to settlers, and sold, four tracts of land . . . .

The very best farming land that *was* in the Rosebud Reservation we gave up when the counties of Tripp and Gregory were

opened to settlement. Petitions, Brief of Appellees below at 57 (emphasis added).

As this Court stated in *Mattz,* although subsequent legislation is usually not entitled to much weight when construing earlier statutes, it is not always without significance. *Mattz, supra* at 481, n. 25. [4]

II

THE PETITION DOES NOT PRESENT A QUESTION WORTHY OF THE DISCRETIONARY JURISDICTION OF THIS COURT.

A. The Decision Below Does Not Present a Question of Broad General Importance in Indian Law.

Contrary to the position of Petitioner, the decision below does not present a question of broad general importance in Indian law. Insofar as the Rosebud Reservation is concerned, the decision simply maintains the status quo. The portions of the original reservation affected by the three Rosebud Acts have not been considered to be within the boundaries of the Rosebud Reservation for over sixty-five years. The boundaries of the Rosebud Reservation encompass Todd County. While Petitioner might "believe" the other counties involved have been and are now administered by the United States as an "Indian reservation," this belief is wholly without foundation. Pet. at 17. As a matter of common knowledge, no agency of the federal government has ever treated these areas as an Indian reservation since the passage of the Acts in question. A cursory examination of the records in the Office of the

4. Also see Pet. App. A at 34, n. 54, 44 n. 88, for the text of some of the *statutes* that describe the other counties as "heretofore a part of" and "formerly within" the Rosebud Reservation. In contrast to the *informal* correspondence in *DeCoteau* that contained similar references which the Court could not weigh heavily, the Rosebud statutes are clearly significant. Some of the sponsors of the Acts in issue also sponsored the "former" legislation. Moreover, the cartographic record of the original Rosebud Reservation also reflects this construction. It is identical to that of the Lake Traverse Reservation. *DeCoteau* at 442.

United States Attorney for the District of South Dakota would confirm this fact. Moreover, until recently the Rosebud Sioux Tribe always operated under this assumption. In the early 1960's, the Tribal Council even refused to allow a member of the tribe that resided in one of the counties in question to run for tribal chairman. The stated reason of the Tribal Council was simply that the member did not "reside on the reservation." In other words, he did not reside in Todd County. [5]

In stark contrast to Todd County, the Rosebud Reservation, the counties of Gregory, Lyman, Mellette and Tripp are not unlike the other counties in the State of South Dakota that are *not* within the boundaries of an Indian reservation. In terms of the land still held in trust by the United States Government for the benefit of the members of the Rosebud Sioux Tribe, the entire acreage does not exceed *15 percent* of the total land base. Approximately *10 percent* of the resident population are enrolled members of the Rosebud Sioux Tribe. These members reside throughout the counties with the other non-member residents of the State of South Dakota on small

5. It is doubtful that the Tribal Council would elect to enforce a similar requirement today. In recent months the views of the Tribal Council have changed considerably. The statement of Petitioner at 25 that the jurisdiction of the Rosebud Sioux Tribe is limited to Indians on the Reservation has evidently not been formally passed on to this tribal government or this tribal court. Within the past year, the Rosebud Sioux Tribe has enacted two separate ordinances to the contrary. The first ordinance asserts *complete* civil and criminal jurisdiction over *all* persons within the original boundaries of the Reservation. The second ordinance asserts the right to *remove* to the original boundaries of the Reservation *any* person deemed "socially undesirable." Although the tribal court has not issued any orders to date under the second ordinance, it does routinely issue and attempt to act on arrest warrants for non-members, felonies and misdemeanors alike, pursuant to the first ordinance. This is the same tribal court that issued an order purporting to restrain the entire Federal Bureau of Investigation from executing federal felony arrest warrants anywhere within the same boundaries. As recently as last week, the tribal court issued an ex parte order restraining all County High School officials and members of the Board of Education from implementing a disciplinary decision that removed a student from a basketball team. All but three of the school officials are not members of the Rosebud Sioux Tribe. The jurisdiction of the Rosebud Sioux Tribe might well be "limited" but the conception of this limitation in the eyes of the tribal government and tribal Court is to date difficult to ascertain.

farms and ranches, and in rural communities such as Winner, South Dakota, with a total population of approximately 4,000. Respondents offer these facts as such and nothing more. This Court has a right to know that the Petition does not present an issue that involves only members of the Rosebud Sioux Tribe residing on land traditionally designated as within the boundaries of a reservation. [6]

6.

County	Total Acreage	Trust Land	Percent of Total	% Enrolled in Tribe	Total Population
Gregory*	639,360	24,463	3.826	4.98	6,701
Tripp	1,036,800	71,291	6.876	6.00	8,169
Mellette	835,840	284,831	34.077	34.00	2,413
Lyman*	124,165	2,090	1.683	NA	NA
TOTAL	2,636,165	382,675	14.5	9.5	17,283

Acreage figures are based on the portion of the county within the original 1889 boundaries of the Rosebud Reservation as of June 30, 1975. Bureau of Indian Affairs, Department of Realty, Rosebud, South Dakota. The population figures were only available for the entire county. Census of the Population, 1970, Characteristics of the Population, Part 43, South Dakota.

If the population figures are to be used "even as coloring," Petitioner objects to the use of the 1970 Federal Census because it is "grossly inaccurate." Pet. at 25, n. 22. Petitioner would rather have the Court rely on the figures in the table Petitioner has prepared at Appendix B at 129. The cited source listed under "Reservation Population" is not identified beyond "Federal and State Indian Reservations." App. B at 129. Respondents obtained a copy of the most recent edition of a work entitled "Federal and State Indian Reservations and Indian Trust Areas" printed in 1974 by the Department of Commerce. Stock No. 0311-00076. For the original Rosebud Reservation it lists "Mellette, Todd and Tripp Counties." Federal and State Indian Reservations at 500. Gregory County is omitted entirely. Moreover, the population statistics are said to encompass "Indians residing on or adjacent to reservation" and not just "Reservation Population." State and Federal Indian Reservations at 501. In this light, the county by county breakdown of the 1970 Federal Census would appear to Respondents to serve as a more appropriate source of accurate information. Petitioner has arbitrarily selected the year 1925 as a source from which to list the total acreage of trust land remaining in the counties in question. The source of the trust land statistics Respondents have submitted are the most recent available from the Bureau of Indian Affairs, Rosebud, South Dakota.

In the petition for rehearing en banc below, Petitioner and the Government severely reprimanded the court of appeals for the citations to trust land and population figures appearing in the opinion of the court. According to Petitioner and the Government, these facts had "no legal bearing" on the issue presented. Before this Court, Petitioner renews some of the criticism. All are "irrelevant" and the number of non-Indians specifically has "no relevancy." Pet. at 24, 25. In the first place, the court below never stated that the statistics did have a "legal bearing" on the issue of congressional intent. Secondly, Petitioner and the Government should address whatever their point is to this Court, for the *DeCoteau* opinion cites similar statistics for the Lake Traverse area, specifically noting that within the original Lake Traverse Reservation boundaries there now "reside about 3,000 tribal members and 30,000 non-Indians. About 15 per cent of the land is in the form of 'Indian trust allotments.' " *DeCoteau, supra* at 428.

In these counties, as in *DeCoteau,* Respondents have exercised jurisdiction over the unallotted land of the former reservation for sixty-five years. As recently as 1967, the Eighth Circuit Court of Appeals affirmed the long line of decisions that recognized this jurisdiction. *Beardslee v. United States,* 387 F.2d 280 (CA 8 1967). With specific reference to the four counties in question, Judge Blackmun, now Justice Blackmun, succinctly stated that the unallotted land therein was *"non-reservation land"* with respect to 18 U.S.C. 1151. It was not within the boundaries of the Rosebud Reservation.

> The Rosebud Reservation was established by, and is described in, § 2 of the Act of March 2, 1889, 25 Stat. 888. The boundaries of Todd County, in which the town of Mission is located, are laid down in S.D. Code, § 12.0162 (1939). All of Todd County is obviously within the original boundaries of the Rosebud Reservation. Only three Acts of Congress have affected the *territory* of the reservation since its establishment in 1889 and none of these concern Todd County. Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448. No part of the Todd County portion of the reservation has ever been formally opened. Instead, that portion has remained closed since 1889. *The general geographical situation is thus clear.*
>
> [With respect to 18 U.S.C. 1151] We regard clause (c) as applying to allotted Indian lands in territory *now open* and not as something which restricts the plain meaning of clause (a)'s phrase 'nothwithstanding the issuance of any patent'. Although this result tends to produce some checkerboarding in *non-reservation land,* it is temporary and lasts only until the Indian title is extinguished. *Beardslee, supra* at 285, 287 (emphasis added).

The decision of this Court in *DeCoteau* correctly affirmed the rationale of *Beardslee* in terms of the applicability of 18 U.S.C. 1151(c). *DeCoteau, supra* at 446-447. *See* also, *United States v. Pelican,* 232 U.S. 442 (1914), cited with approval in *DeCoteau, supra* at 446-447.

In light of all of the above, the decision below could not possibly have a "revolutionary impact on reservation life" on the Rosebud Reservation. Pet. at 17. Todd County is the Rosebud Reservation and the status of Todd County is not in issue. In addition to the allotments which are still held in trust in the counties in question, the members of the Rosebud Sioux Tribe therefore have more than an adequate fulcrum from which to continue to conduct tribal affairs. This is the system that has functioned for the Rosebud Sioux Tribe in the past, and there is no reason to assume that it cannot continue to function in the future.

The assertion by Petitioner that the decision below will "open the way to destroy the reservation status" of untold portions of other reservations is similarly untenable. Pet. at 17. The court below, in recognition of one of the most fundamental principles of Federal Indian Law, stated that "obviously separate treaties and agreements with separate tribes

must be separately construed." Pet. App. A at 5. Under the guidance of *Seymour, Mattz* and *DeCoteau,* the language, legislative history and surrounding circumstances of each act will continue to be the controlling factor. Moreover, at least some of the areas affected by the acts selectively chosen by Petitioner to come within the purvue of this "destruction" have not been recognized as parts of reservations for years. (for example, among others, items No. 10 and No. 18). Pet. App. D at 129.

As in *DeCoteau,* the decision below does constitute a refusal to judicially re-establish, under the guise of statutory construction, the boundaries of a reservation correctly held to have been disestablished for over sixty years. Perhaps this is the "destruction" to which Petitioner refers. The treatment accorded *DeCoteau* in the Federal Indian Law Reporter is in this respect enlightening.

In April of 1975, a specific section of the Indian Law Reporter was devoted entirely to *DeCoteau.* II ILR 3 at 53. Significantly, the Reporter did not question whether the issue was correctly decided by the Court in *DeCoteau.* Nor did it object to the manner in which the Court refused, under the guise of statutory construction, to disregard *clear* evidence of congressional intent. Rather, the entire article was addressed to the reasons why *DeCoteau* should never have been presented to the Court for a decision in the first place if "communication and coordination could have been initiated." II ILR 3 at 53.

In retrospect, the Reporter noted that in terms of "comprehensive law reform strategy" *DeCoteau* could have thwarted "efforts presently being conducted in Oklahoma aimed at *re-establishing* through the courts the *original* boundaries of several reservations." II ILR 3 at 53. In terms of "comprehensive law reform strategy," if the facts in *DeCoteau* were not the "most favorable" then the case "need not have proceeded to the Supreme Court in just this way." II ILR 3 at 53. In terms of "comprehensive law reform strategy"

this simply meant that next time there should be a "meeting" delineating the "strongest cases to be pursued" or at least "not weak cases to be pushing." II ILR 3 at 54. The "appropriate government agencies" would, of course, be invited to attend. II ILR 3 at 55.

The implications of this "comprehensive legal reform strategy" aimed at *"re-establishing" original reservation boundaries* when issues of *statutory construction* are presented to a court are disturbing to Respondents. Assuming, as the Reporter did, that *DeCoteau* was correctly decided and that surplus land statutes enacted pursuant to the General Allotment Act were clearly intended by Congress to disestablish portions of reservations, then what the Reporter was actually saying was that another act should have been "pursued" in which the intent of Congress could not have been made so clear. In this manner, this Court might have *misconstrued* the intent of Congress and the boundaries of many original reservations could have been "re-established." II ILR 3 at 53.

Respondents are not, nor could they afford to be, in the business of "comprehensive legal reform strategy." None of the reservation boundary cases have been initiated or filed by Respondent. The instant suit was filed by the Rosebud Sioux Tribe, although the filing was purportedly against the advice of present counsel. After the decision below, the Tribal Chairman of the Rosebud Sioux Tribe, Robert Burnette, publicly announced that:

> The Rosebud Boundary Case was started in Federal Court, against the advice of the outstanding attorney, Marvin J. Sonosky, and, Robert Burnette. The Todd County Tribune, Mission, South Dakota, Vol. 55 No.44, Thursday, August 21, 1975.

In this context, if the decision of the Eighth Circuit Court of Appeals frustrates the ultimate designs of some individuals of *re-establishing original reservation boundaries* through the courts and *contrary to the original intent of Congress,* the In-

dian Law Reporter cannot be faulted. Nor can the court of appeals. Someone should have had a "meeting" and dismissed this case. The language, legislative history and surrounding circumstances of the Rosebud Acts made only too clear to the court of appeals what actually was the intent of Congress and the understanding of the Rosebud Sioux Tribe.[7]

B. The Decision Below is not in Conflict With the Decisions of This Court.

The decision below is fully in accord with the "guiding principles" of *Seymour, Mattz* and *DeCoteau. DeCoteau, supra* at 449. The opinion below *accurately reflects what was clearly the intent of Congress and the understanding of the Rosebud Sioux Tribe.* The court below studied with care the language, legislative history and surrounding circumstances of the three Rosebud Acts in order to insure that this was in fact the case.

Petitioner has attempted to bring *Rosebud* within the purview of the *results* in *Seymour* and *Mattz* by concentrating on the two paragraphs of noted differences at the end of the *DeCoteau* opinion. In this attempt Petitioner has ignored the principles enunciated in the other 23 pages of the *DeCoteau* opinion. The quest is not for a uniformity of results in utter disregard of the language, legislative history and surrounding circumstances of a given statute. That argument was rejected in *DeCoteau:* "A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." *DeCoteau, supra* at 447.

In *Rosebud,* as in *DeCoteau,* the *facts* all point unmistakably to the same conclusion. In *Rosebud,* as in *DeCoteau,* the conclusion is that the Acts disestablished certain portions of the reservation. There is no question to present. There is no conflict. *Seymour, Mattz* and *DeCoteau* more than adequately represent the settled law.

7. In the absence of *DeCoteau* and the decision below, roughly one third of the entire state of South Dakota would have been engulfed by this process of "re-establishing" *original* reservation boundaries.

The other decisions of this Court cited by Petitioner that were decided in the late 1800's and early 1900's are inapposite. Pet. at 19. In each, the question then before the Court had nothing to do with congressional intent and the understanding of the tribe with respect to reservation boundaries. The tribe in *DeCoteau* presented a similar array of citations to these same cases. The Court in *DeCoteau* did not find them sufficiently relevant to even merit citation in the opinion.

The decision of *Ash Sheep Company v. United States,* 252 U.S. 159 (1920), can be viewed in a different light. Although the Court in *Ash Sheep* did not address a boundary question, the opinion is not entirely without relevance. However, rather than support Petitioner, *Ash Sheep* erodes the position of Petitioner by addressing one aspect of the "uncertain-sum-in-trust" provision.

In *Ash Sheep* the Court was presented with the question of whether the Crow Tribe retained a lingering beneficial interest in surplus lands which it had *ceded* under a 1904 act that contained the uncertain-sum-in-trust provision. The Court held that this beneficial interest did exist *until* the lands were filed or settled upon. *Ash Sheep, supra* at 166. Significantly, the nature of this lingering beneficial interest did not, however, alter the fact that the 1904 act which recited and ratified the Crow cession effectively *disestablished* the surplus area so ceded from the Crow reservation.

The Court in *Ash Sheep* did not directly address this aspect of the cession question. It was made clear on the face of the act. Because the area to be ceded could not be described by means of county subdivisions, *new boundary lines* were mentioned in the act in no less than five separate places. Act of April 27, 1904, 33 Stat. 352, 359, 360. Section 4 is an example of the language employed therein:

> SECTION IV. That for the purpose of *segregating the ceded lands from the diminished reservation, the new boundary lines* described in Article I of this

> Agreement shall when necessary be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the costs of said survey to be paid by the United States. Act of April 27, 1904, 33 Stat. 352, 355 (emphasis added).

Thus, in its opinion, the Court simply noted:

> The agreement embodied in this act of Congress provided for a division of the Crow Indian Reservation in Montana on *boundary lines* which were described, and the lands involved in this case were within the part of the reservation as to which the Indians, in terms, 'ceded, granted and relinquished' to the United States all of their 'right, title, and interest.' *Ash Sheep Company, supra* at 164 (emphasis added).

The 1904 Crow Act did contain the uncertain-sum-in-trust provision, and it was intended and did effectively disestablish the ceded surplus portion of the reservation. The Bureau of Indian Affairs has confirmed that both the Bureau and the Crow Tribe have always recognized this fact. The Acts presented for construction herein, which also contain the uncertain-sum-in-trust provision, were also intended and did effectively disestablish the ceded surplus portions of the Rosebud Reservation. The Bureau of Indian Affairs and the Rosebud Sioux Tribe have also always recognized this fact.

C. The Decision Below is not in Conflict With any Decision of the Supreme Court of the State of South Dakota.

Petitioner fails to even acknowledge that since the date of the Rosebud Acts the position of the Supreme Court of the State of South Dakota has consistently been in accordance with the holding of the court below. On August 1, 1975, the opportunity for the court to again express that opinion was presented in *State v. White Horse*, No. 11319-a-JMD (S.D. filed August 1, 1975)

The single question of whether that portion of the original Rosebud Reservation situated in Tripp County was dis-

established by the Act of March 2, 1907, was before the court in *White Horse*. After a careful review of the same language, legislative history and surrounding circumstances that was analyzed below, and a careful review of the opinion below, the court in *White Horse* concluded:

> On the basis of this decision and the congressional history quoted therein, as well as the further circumstance that the State of South Dakota has exercised criminal and civil jurisdiction over the years with the *full acquiescence of all responsible federal authorities*, we can see no justification requiring that the status be altered at this late date. We conclude that the Act of 1907 did disestablish that portion of the Rosebud Reservation containing Tripp County; therefore, the State of South Dakota has jurisdiction to prosecute the defendant in Tripp County for the offense charged. *White Horse, supra* at 6 (emphasis added).

Again, there is no question to present. There is no conflict. In *Seymour, Mattz* and *DeCoteau* the proper guidelines were set forth with sufficient clarity to have enabled both courts to reach the same conclusion.

D. The Decision Below is not in Conflict with Any Decision of Any Circuit Court of Appeals.

Significantly, the decision of the court below is the only federal appellate case on point to have been decided *after* the decision of this Court in *DeCoteau*. As a result, the Eighth Circuit Court of Appeals is the only federal appellate court that has as yet had the opportunity to resolve the issue presented in light of the guiding principles of *Seymour, Mattz* and *DeCoteau*. Prior to *DeCoteau*, as *DeCoteau* attests, some circuits might have thought a finding of disestablishment inconsistent with *Seymour* and *Mattz*. *DeCoteau, supra* at 447. The guidance of *DeCoteau* was necessary to quell this misconception. Respondents would submit that this Court give serious consideration to the possibility of at least allowing other circuits an opportunity to

analyze *DeCoteau* and then agree or disagree with the court below before any writ of certiorari on point is granted.

The position of Petitioner that *United States v. Washington*, 496 F.2d 620 (CA 9 1974) *cert. den.* 419 U.S. 1032, creates this conflict among the circuits is wholly untenable. In the first place, *Washington* was decided and certiorari was denied *prior* to the decision of this Court in *DeCoteau*. Secondly, even if the Ninth Circuit did not need the guidance of *DeCoteau*, the mere fact that the court in *Washington* found that the Puyallup Reservation was intended to continue to exist as such is indicative of nothing. A uniformity of result is not required if that result was not clearly the intent of Congress and the understanding of the Tribe. The end result of *Seymour*, *Mattz* and *DeCoteau* are proof positive of this fact.

Respondents doubt that the two paragraph *per curiam* opinion of the Ninth Circuit Court of Appeals would be of much assistance to this Court in this respect. The 1893 Act construed in *Washington* was merely an undifferentiated part of an appropriation statute that received only summary treatment by Congress. In fact, another tribe has since conceded that because of the striking dissimilarity of the 1893 Act in *Washington*, it could not be compared to acts similar to those presented in the instant case. Brief for Appellant at 8, *United States ex rel. Cook v. Parkinson*, No. 75-1306 (CA 8, filed Oct. 29, 1975). Respondents agree.

Again, there is no question to present. There is no conflict. Moreover, this Court should be reluctant to grant any petition for certiorari on point at least until other circuits have had an opportunity to analyze *DeCoteau* and the decision below.

E. The Decision Below Is Clearly Correct.

As Respondents stated in the Statement of Facts, no attempt will be made within the confines of this Brief in Opposition to support the decisions below in terms of specific evidence of congressional intent. This material is set forth persuasively in the opinions below. The content and structure

of the Petition itself in many material respects, however, lends additional credence to the decisions below. These areas are worthy of the further attention of the Court.

1. In the court below, two entire pages of the opinion were addressed to the fundamental constitutional basis of *Lone Wolf v. Hitchcock, supra.* Before this Court the Petition is still saturated with innuendos that ignore the rationale and effect of the decision. The innuendos are almost a concession that with respect to *intent* and *understanding*, the decision below is correct.

Respondents have never expressed any opinion that necessarily condones, approves or supports the General Allotment Act or the actions of the federal government pursuant to the policy expressed therein. Nevertheless, proof of the continuing validity of the *Lone Wolf* doctrine is the present procedure still available to Indian tribes to remedy an alleged breech of a fiduciary duty by the Government. Congress is still the "body" referred to in the *Lone Wolf* opinion from which the Constitution directs that redress must be obtained. In the past, a remedy has been provided by Congress through proper suit brought before the United States Court of Claims and its IndianClaims Commission. In the future it might well be that other remedies will be authorized by and obtained from Congress.

Counsel for Petitioner is a highly skilled and acknowledged Indian Claims attorney. *Lone Wolf* was not even cited by Petitioner in the court below, and is only before this Court by innuendo. If Petitioner has a meritorious issue, Respondents are confident that counsel for Petitioner will not rest until that issue is satisfactorily resolved. But the issue before this Court, as stated in *DeCoteau*, is a "narrow" one — the intent of Congress and the understanding of the tribe.

Thousands of individuals have had to rely upon the intent of Congress since the date of the Acts in question. With the benefit of hindsight, many chapters of American history might be rewritten. As the court below noted, however, it did

not "sit to rewrite the legislation of decades past." Pet. App. B at 6. A canon of construction is not, as noted in *DeCoteau*, "a license to disregard clear expressions of tribal and congressional intent." *DeCoteau, supra* at 447.

2. Another notable characteristic of the Petition is the rather conspicuous absence of any citations to or quotations from any document of the period in substantial support of the sophisticated argument therein. In the hundreds of pages of congressional documents that are concerned with the Rosebud legislation, certainly one document should have contained one paragraph as an express manifestation that Congress and the Rosebud Sioux Tribe actually intended the boundaries of the original Rosebud Reservation to remain intact. This is especially so in light of the fact that this intent would have necessarily been a *departure* from what this Court in *DeCoteau* found to be the *rule* rather than the *exception*. Moreover, when one considers the unequivocal references to the contrary set forth in the opinions below, the absence of even this one paragraph becomes something more than an anomoly.

The kind of documentation that is presented in the Petition in support of the minor arguments that *en masse* are meant to constitute evidence of this intent, was rejected in *DeCoteau*. It was not deemed a reliable source from which to ascertain the intent of Congress or the understanding of the tribe in *DeCoteau* because it was not founded on the language, legislative history or surrounding circumstances of the Act in question. Moreover, it was in irreconcilable conflict with express manifestations therein to the contrary. In *Rosebud*, as in *DeCoteau*, an argument founded on this kind of documentation could not be persuasive.

3. A related characteristic of the Petition that lends credence to the opinions below is the manner in which the Petition fails to directly address or offer alternative constructions to those documents deemed persuasive below. Prior to *DeCoteau*, Petitioner simply discounted all legislative

history. "There is no occasion here to discuss the phrase 'restored to the public domain' because it does not appear in any of the Rosebud statutes." Brief for Appellant below at 28. In this manner Petitioner avoided addressing all Rosebud references to this effect in the Senate and House Documents and the *Congressional Record*, as well as other references of an equally probative nature.

Subsequent to *DeCoteau*, Petitioner even used *DeCoteau* in partial support of this position. In one segment of the *DeCoteau* opinion the Court noted that after the 1889 Agreement was concluded only three aspects of the legislative history were of particular significance. This was result of the fact that many agreements were ratified by the 1891 Act and the Act itself was merely a part of the general appropriation statute dealing with all areas of Indian affairs. The subsequent legislative history was largely irrelevant in *DeCoteau*. The Court expressed this thought in the following manner:

> While the subsequent legislative history is largely irrelevant to the issues before us, three aspects bear notice. *DeCoteau, supra* at 437-438.

Petitioner presented the sentence to the court below in an entirely different manner:

> The Court indicated that the legislative history after the agreement was sent to Congress was hardly relevant, stating (____U.S._____, 43 L.ed at p. 3107):
> 'While the subsequent legislative history is largely irrelevant to the issues before us* * *.' Petition for rehearing en banc below at 7, n. 12.

Thus, according to Petitioner, all Rosebud legislative history subsequent to the Rosebud Agreements was equally irrelevant. This most certainly is not the context in which the statement was made in *DeCoteau*. The citations to each and every source of probative evidence in *DeCoteau* confirm this fact. Nevertheless, it did constitute another reason, although

clearly untenable, for Petitioner to avoid addressing the persuasive evidence of Congressional intent inherent in the Rosebud documents. Before this Court the position of Petitioner is essentially the same. Those references which Petitioner cannot attribute to an "erroneous understanding" or "mistaken belief" are simply ignored. The decisions below are persuasively documented in terms of the intent of Congress and understanding of the Rosebud Sioux Tribe. This documentation cannot be eroded *sub silento.* [8]

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents

November, 1975

8. Respondents are cognizant of the admonition in *DeCoteau* that competing policy pleas are not properly within the scope of the "narrow task" of this Court. *DeCoteau, supra* at 449. For this reason Respondents have not set forth certain facts that would more than counter all of the policy arguments presented in the Petition.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

74-1211 September Term, 1975

Rosebud Sioux Tribe, *Appellant,*	)	
vs.	)	Appeal from the United States District Court for the District of South Dakota
Honorable Richard Kneip, etc., et al., *Appellees.*	)	

Appellant's motion for leave to file enlarged petition for rehearing en banc out of time has been considered by the Court and is denied.

September 16, 1975